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NO. 93-52

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

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UNITED STATES OF AMERICA,

Petitioner,

v.

LaSHAWN NICHOL CLAY,

Respondent.

ON PETITION BY THE UNITED STATES OF AMERICA FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

MARIAH A. WOOTEN
Deputy Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

Counsel for Respondent
LaShawn Nichol Clay

QUESTION PRESENTED FOR REVIEW

Title 18, United States Code § 3565(a) (1988 and Supp. III 1991) requires a defendant whose probation is revoked due to possession of a controlled substance to be sentenced to a term "not less than one-third of the original sentence." The question presented for review is whether "original sentence" refers to the period of imprisonment that could have been imposed at the time of the initial sentencing (pursuant to the sentencing guidelines) or to the term of probation actually imposed.

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BRIEF IN OPPOSITION

LaShawn Nichol Clay, Respondent, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's opinion in this case entered on January 6, 1993.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported as United States v. Clay, 982 F.2d 959 (6th Cir. 1993). The orders of the United States District Court for the Middle District of Tennessee are unreported. The text of the appellate opinion is included as Appendix A to the Government's Petition for a Writ of Certiorari. The text of the district court are included as Appendices B and C to the Government's Petition for Writ of Certiorari.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1993. A petition for rehearing was denied on April 6, 1993. (Government App. D). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 3565. Revocation of probation

> **(a) Continuation or revocation.**--If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 3553(a) to the extent that they are applicable--
>
> > (1) continue him on probation, with or without extending the term or

> modifying or enlarging the conditions; or
>
> (2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.
>
> Notwithstanding any other provision of this section, if a defendant is found by the court to be in possession of a controlled substance, thereby violating the condition imposed by section 3563(a)(3), the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence.

STATEMENT OF THE CASE

Pursuant to a guilty plea, LaShawn Nichol Clay was convicted in the United States District Court for the Middle District of Tennessee of one count of unlawful possession of a government check stolen from the mail, in violation of 18 U.S.C. § 1708. United States v. Clay, 982 F.2d 959, 960 (6th Cir. 1993). The statutory maximum punishment for the offense was up to five (5) years imprisonment and/or a fine of up to Two Hundred Fifty Thousand Dollars ($250,000). At the sentencing hearing on August 30, 1990, based upon a criminal history category I and a total offense level of seven (7), the district court found the applicable guideline range of imprisonment to be one (1) to seven (7) months. The district court sentenced Ms. Clay to probation for a term of three (3) years with the following special conditions:

> (1) that she reside for thirty (30) days in a drug treatment facility;

(2) that she then reside for ninety (90) days in a community treatment facility or halfway house;

(3) that she participate in a drug treatment program which may require drug testing;

(4) that she pay restitution in the amount of Six Hundred Ninety-Eight Dollars ($698); and

(5) that she provide financial information as requested by the probation office.

Id. at 961.

On February 27, 1992, a probation violation warrant was signed by the district judge, which alleged in part that Ms. Clay had violated the conditions of her probation by the possession and/or use of illegal drugs. At the probation violation hearing on March 30, 1992, the district court found that Ms. Clay had violated the conditions of her probation and found her guilty of the allegations in the probation violation warrant, including the use and possession of cocaine. The court revoked her probation and revoked her bond. Id.

On April 20, 1992, at the sentencing hearing, the district court adopted the Ninth Circuit's construction of 18 U.S.C. § 3565(a) as stated in United States v. Corpuz, 953 F.2d 526 (9th Cir. 1992). The district court construed the phrase "original sentence" as used in § 3565(a), as meaning the original sentence of probation actually given. As the district court had given Ms. Clay a sentence of probation for a term of three (3) years, the court reasoned that the court was required to impose a term of imprisonment which was at least one-third of the three (3) years

probation. The court concluded that § 3565(a) required that Ms. Clay be sentenced to at least twelve (12) months imprisonment. The court sentenced her to fifteen (15) months imprisonment, to be followed by supervised release for a term of three (3) years. (*Probation Revocation Hearing Tr. 2*).

Ms. Clay appealed her sentence. The court of appeals vacated the sentence and remanded the case to the district court with instruction to have Ms. Clay released forthwith from confinement if she had been incarcerated for a period in excess of the maximum allowable under the applicable sentencing guidelines imprisonment range.[1] Id. at 965.

The court of appeals commenced its analysis by acknowledging that pursuant to the Sentencing Reform Act of 1984 probation is a type of sentence. However, as probation has traditionally been viewed not as a sentence of punishment, but a period of grace, the onus was on Congress to make it absolutely clear where "sentence" is to refer to a "sentence of probation," by including the appropriate modifying pre-positional phrase or by making the meaning absolutely clear from the context. The court further reasoned that without this clarification, the term "original sentence" should mean what it has always meant--a sentence of imprisonment. Given such a lack of clarity, "original sentence" in 18 U.S.C. § 3565 must refer to the original sentencing guidelines imprisonment range. Id. at 962.

---

[1]Ms. Clay was released from incarceration and placed on bond on January 8, 1993, pending the Government's petition for writ of certiorari.

Further, the court of appeals reasoned that three (3) years of probation cannot be equated with three (3) years of imprisonment. Had Ms. Clay received the maximum term of probation sixty of (60) months for her initial crime and subsequently violated the terms of her probation by possessing a controlled substance, she could have been sentenced to a term of imprisonment (of five years) that was 857 percent higher than the sentencing guideline maximum term of imprisonment. This interpretation of "original sentence," according to the court of appeals, seemed to defy common sense. Id. at 963.

Additionally, the court reasoned that without a clear expression of congressional intent to repudiated the law prior to the anti-drug abuse amendment to 18 U.S.C. § 3565(a), the court should try to reconcile the anti-drug abuse amendment to the rest of § 3565(a). Before the anti-drug abuse amendment, the maximum sentence that could have been imposed after a violation of probation was the maximum sentence available at the time of the initial sentencing. Interpreting "original sentence" to mean an original sentence of probation may well take the new sentence of imprisonment out of the original sentencing guideline range. By interpreting "original sentence" to refer to the sentence of imprisonment that could have been imposed originally, less violence is done to § 3565(a)(2) in that, though the court's discretion is limited to a degree by the amendment, the new sentence of imprisonment must still fall within the original sentencing guideline range of imprisonment. Id. The court of appeals also

made an analogy to the supervised release provision. The court reasoned that given the parallel structure of the statutory provisions, the court should assume that the marked somatic difference connotes an intended penalogical difference. Id at 964.

The court of appeals further recognized that *requiring* a court to impose a sentence of *imprisonment of at least* one-third of the original sentencing guideline maximum imprisonment term advances the goal of the anti-drug abuse amendment insofar as it builds a floor below which a sentencing judge may not go upon a defendant's revocation of probation for possession of a controlled substance. Id. (citing U.S. v. Gordon, 961 F.2d 426, 433, n.8).

The court of appeals' analysis of the statute maintains the integrity of the sentencing guidelines. Pursuant to 18 U.S.C. § 3553(d) (1988), the district court shall impose a sentence upon a defendant within the sentencing guideline range,

> unless the court finds that there exists an aggravating or mitigating circumstances of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

Title 18, U.S.C. § 3553(c)(2) (1988) requires a district court to provide specific reason to support a departure from the guidelines. The court reasoned that sentencing Ms. Clay to anything above seven (7) months of imprisonment would amount to an upward departure from the guidelines without requiring a "reasoned statement" as to why the guidelines do not adequately take into consideration the circumstances of her case. There was a finding of the district

court that Ms. Clay was in possession of a controlled substance. *While mere findings are enough to justify adjustments,* see United States v. Duque, 833 F.2d 43, 44-45 (6th Cir. 1989), *they cannot justify departures.* Id. The court of appeals further reasoned that interpreting "original sentence" to mean original sentence of probation essentially ignores the reasoned statement requirement for guideline departures and how the guidelines are to be employed. Id. at 964-65.

Finally, the court of appeals concluded that 18 U.S.C. § 3565(a) is an ambiguous statute. When interpreting ambiguous criminal statutes, the policy of lenity comes into play. And as applied in this case, and following the authority of this Court, the policy of lenity dictated that the court err on the side of the lesser penalties by interpreting "original sentence" to refer to the original sentencing guideline imprisonment range. Id. at 965. The court accordingly vacated the sentence and remanded the case to the district court with instructions.

REASONS FOR DENYING THE WRIT

Respondent acknowledges that this case presents the same issue as United States v. Granderson, 969 F.2d 980 (11th Cir.), cert. granted, No. 92-1662 (June 28, 1993). Respondent also acknowledges that a circuit split does exist on the interpretation of the phrase "original sentence" in 18 U.S.C. § 3565(a). However, Respondent submits that certiorari is not needed in this case because the decision of the United States Court of Appeals for the Sixth Circuit in this case is correct and consistent with United States Supreme Court precedent, common sense, and public policy. Furthermore, Respondent submits that only three circuits support the Government's position, United States v. Sosa, 997 F.2d 1130 (5th Cir. 1993), United States v. Byrkett, 961 F.2d 1399 (8th Cir. 1992) (per curiam); and United States v. Corpuz, 953 F.2d 526 (9th Cir. 1992). The circuits supporting the Respondent's position are United States v. Alese, 1993 U.S. App. LEXIS 25110 (2d Cir. September 1993); United States v. Gordon, 961 F.2d 426 (3d Cir. 1992); United States v. Diaz, 989 F.2d 392 (10th Cir. 1993); and United States v. Granderson, 969 F.2d 980 (11th Cir.), cert. granted, No. 92-1662 (June 28 1993). The Fifth, Eighth, and Ninth Circuits should have an opportunity to reconsider this issue en banc to determine whether the panel opinions should be overruled in light of the significant recent precedent of its sister circuits rejecting their panel's analysis. This Court's intervention may never be necessary to resolve the conflict among the circuits.

ARGUMENT

The court of appeals in United States v. Clay, 982 F.2d 959 (6th Cir. 1993), was correct in its interpretation of the phrase "original sentence" in 18 U.S.C. § 3565(a) and its opinion provides a very comprehensive analysis of this issue. The court acknowledged that pursuant to the Sentencing Reform Act of 1984 probation is a sentence. Id. at 962; United States v. Granderson, 969 F.2d 980, 982 (11th Cir.) cert. granted, No. 92-1662 (June 28, 1993). However, the court of appeals concluded that a sentence of probation does not equate to a sentence of incarceration. Probation is a punishment of entirely different degree than imprisonment. Id. Probation, has traditionally been viewed not as a sentence of punishment, but a "period of grace" or "a conditional liberty." Clay, 982 F.2d at 962. The court of appeals in Granderson stated that probation and imprisonment are not fungible. Granderson, 969 F.2d at 984. Given the traditional understanding of probation, the onus was on Congress to make it absolutely clear where "sentence" is to refer to a sentence of probation, by including the appropriate modifying pre-positional phrase or making the meaning absolutely clear from the context. Clay, 892 F.2d at 962.

The appellate court in Clay concluded that 18 U.S.C. § 3565(a) is an ambiguous statute and therefore followed the decisions of this Court in applying the policy of lenity. As this Court has stated,

> this policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on nor more than a guess as to what Congress intended.

Ladner v. United States, 358 U.S. 169, 178, 79 S.Ct. 209, 214, 3 L.Ed.2d 199 (1958). As applied to this case, the court of appeals indicated that the policy of lenity dictated that the court err on the side of the lesser penalties by interpreting "original sentence" to refer to the original sentencing guidelines imprisonment range. Clay, 982 F.2d at 965.

Furthermore, the court of appeals in Clay evaluated policy based arguments in construing 18 U.S.C. § 3565(a). The Court noted that by *requiring a court to impose a sentence of imprisonment at least* one-third of the original sentencing guideline maximum imprisonment term furthers the goal of the anti-drug abuse amendment insofar as it builds a floor below which a sentencing judge may not go upon a defendant's revocation of probation for possession of a controlled substance (emphasis added). Id. at 964; Gordon, 961 F.2d at 433, n.8. Secondly, it recognized that its view and interpretation of the statute maintained the integrity of the United States Sentencing Guidelines. Pursuant to 18 U.S.C. § 3553(b) (1988), the district court must impose a sentence upon a defendant within the sentencing guideline range,

> unless the court finds that there exist an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that

> should result in a sentence different from that described.

In order to depart from the guideline, the district court, at the time of sentencing, must provide a short clear written statement or reasoned statement from the bench that identifies the aggravating factors and its reasons for connecting them to the permissible grounds for departure. 18 U.S.C. § 3553(c)(2) (1988); United States v. Feinman, 930 F.2d 495, 501 (6th Cir. 1991) (quoting United States v. Rodriguez, 882 F.2d 1059, 1066 (6th Cir. 1989), cert. denied, 493 U.S. 1084, 110 S.Ct. 1144, 107 L.Ed.2d 1048 (1990). The court of appeals concluded that interpreting "original sentence" to mean original sentence of probation essentially complies with how the sentencing guidelines are to be employed. Clay, 982 F.2d at 965.

It is clear that interpreting a provision of a statute, it is a "fundamental rule of statutory construction that all parts of the statute must be read together." United States v. Gordon, 961 F.2d at 426, 431. Under § 3565(a)(2), "when a court revokes probation, it has the flexibility to structure a new sentence that may include probation, incarceration, fine, and supervised release. In contrast, in the 1988 amendment, Congress emphatically narrowed the court's sentencing discretion by requiring that a *minimum* sentence of one-third of the original sentence must be imposed. The 1988 amendment, implemented as an anti-drug abuse measure, serves a direction to the sentencing judge that probation *shall* be revoked when probation is violated by the defendant's possession of a controlled substance. United States v. Diaz, 989 F.2d at 391,

392. The 1988 Amendment thus establishes a "floor" below which the district court cannot re-sentence despite § 3565(a)(2) otherwise allowing the imposition of *any* sentence within the original sentencing range. Id. See also Gordon, 961 F.2d at 431. The lower court's decision in this case is a well-reasoned interpretation of 18 U.S.C. § 3565(a) [1988 and Supp. III (1991)], consistent with prior decisions of this Court, and relying upon sound public policy and common sense considerations. Writs of certiorari are a matter of grace, and the court's decision below should not be disturbed.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

DATED: October 12, 1993

Respectfully submitted,

HENRY A. MARTIN
Federal Public Defender

MARIAH A. WOOTEN
Deputy Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

Counsel for Respondent
LaShawn Nichol Clay

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Deputy Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203
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STATE OF TENNESSEE)
) ss
COUNTY OF DAVIDSON)

I, MARIAH A. WOOTEN, being first duly sworn, deposes and says:

On October 12, 1993, the Brief in Opposition to the United States of America's Petition for a Writ of Certiorari and the Motion for Leave to Proceed in Forma Pauperis and the Declaration of Mariah A. Wooten Regarding Mailing of Petition were

served on all parties required to be served in compliance with Supreme Court Rule 29.3, by depositing the documents, first-class mail, postage prepaid, in a United States mailbox on October 12, 1993, addressed to counsel as follows:

William M. Cohen
Assistant United States Attorney
110 Ninth Avenue South, Suite A961
Nashville, TN 37203-3870
(615) 736-5151

Counsel for Petitioner, United States of America, in Court of Appeals and District Court, and

Drew S. Days, III
Solicitor General
Department of Justice
Washington, DC 20530
(202) 514-2217

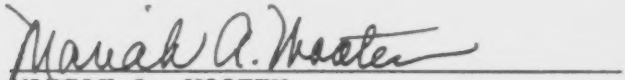
Counsel for Petitioner, United States of America, in the United States Supreme Court.

Served pursuant to Rule 29.4(a)

DATED: October 12, 1993

Respectfully submitted,

HENRY A. MARTIN
Federal Public Defender



MARIAH A. WOOTEN
Deputy Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

Counsel for Respondent
LaShawn Nichol Clay